

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 28, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2011AP2126-CR

Cir. Ct. No. 2009CF2839

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENDRICK L. LEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 HIGGINBOTHAM, J. Kendrick Lee appeals a judgment of conviction entered on a jury's verdict of one count of keeping a drug house and

one count of possession of cocaine with intent to deliver, and an order denying his postconviction motions. Lee contends that he is entitled to a new trial because he received ineffective assistance of counsel in several respects. He also contends that the circuit court erred in denying his motion for an *in camera* review because he met his initial burden to show that there is a possibility that the confidential informant could supply testimony necessary to a fair determination of Lee's guilt or innocence in this case, pursuant to WIS. STAT. § 905.10(3)(b) (2011-12).¹ For the reasons we explain below, we affirm.

BACKGROUND

¶2 A criminal complaint was filed in Milwaukee County Circuit Court charging Lee with possession of a firearm by a felon, possession of cocaine with intent to deliver, and keeping a drug house. The charges stemmed from a raid of a house by the Milwaukee police after receiving information from a confidential informant that an unnamed individual was selling cocaine from 3748 North 17th Street ("the house"). Prior to the raid, the police obtained a warrant to search the house for drugs.

¶3 At the time of the raid, Lee was the only person who police found in the house. Officer Mark Harms found Lee standing next to a coffee table that contained crack cocaine and items commonly associated with crack cocaine dealing, including sandwich bags, latex gloves, a scale, a razor blade, and money. Officer Brian Burch searched Lee and found keys to the house in his pocket.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶4 Lee was arrested, charged, and the case was tried to a jury. Lee was acquitted of the felon in possession of a firearm offense, but was found guilty of possession of cocaine with intent to deliver and keeping a drug house.² Lee filed two postconviction motions, one requesting a new trial on the ground that defense counsel was ineffective in numerous respects, and another requesting the court to conduct an *in camera* review because there was a possibility that the confidential informant could give testimony necessary to a fair determination of Lee’s guilt or innocence, pursuant to WIS. STAT. § 905.10(3)(b). Following a *Machner*³ hearing, the court denied both motions. Lee appeals. Additional pertinent facts are discussed below where necessary.

DISCUSSION

¶5 Before we address Lee’s substantive arguments, we provide context to better understand Lee’s ineffective assistance of counsel claim.

² WISCONSIN STAT. § 961.41(1m) provides, in relevant part, that, “[e]xcept as authorized by this chapter, it is unlawful for any person to possess, with intent to manufacture, distribute or deliver, a controlled substance.” The State was required to prove that: (1) the defendant knowingly had actual physical control of a substance; (2) the substance was a controlled substance whose possession is prohibited by law; (3) the defendant knew or believed that the substance was a controlled substance; and (4) the defendant had the purpose to transfer or attempt to transfer the controlled substance from one person to another or was aware that his or her conduct was practically certain to cause that result. WIS JI—CRIMINAL 6035.

WISCONSIN STAT. § 961.42(1) provides, in relevant part, that, “[i]t is unlawful for any person knowingly to keep or maintain any ... structure or place ... which is used for manufacturing, keeping or delivering [a controlled substance] in violation of this chapter.” The State must prove that: (1) the defendant exercised management or control of a structure or place; (2) the place was used for the manufacturing, keeping or delivering of a controlled substance; and (3) the defendant kept or maintained the place knowingly. WIS JI—CRIMINAL 6037B.

³ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶6 Lee explains that the heart of his defense strategy was to disassociate himself from the house and from the drugs found in the house. In other words, Lee's defense strategy was to establish that he had only a "tertiary connection to the house" and that he was in the house with keys to the house for reasons other than those asserted by the State, namely, to deal drugs. First, as to the reason he was found in the house, Lee explained that his brother Tommie asked him and his brother Jimmie to help move Tommie's belongings to the basement of the house. According to Tommie's testimony, he and his wife had been evicted earlier that day from his sister-in-law's residence and were given permission to store items in the basement of the house by an individual who lived there, known to Lee and his brothers only as "Rowe." Second, as to the reason he was found in possession of keys to the house, Lee explained that, after he and Jimmie completed the move, Jimmie locked the house, and he and Jimmie went outside. Lee testified that, a few minutes before the police raided the house, Jimmie gave him the keys to the house so that he could reenter the house to use the bathroom. As to how the brothers obtained the keys to the house, Tommie testified that "Rowe" gave him the keys and that Tommie then gave the keys to Jimmie. Lee testified that he was in the room containing the drugs and drug dealing paraphernalia at the time of the raid because, as he was washing his hands in the bathroom, he heard a noise coming from the room that contained the drugs and went to investigate. Lee testified that the noise he heard was apparently the police breaking the front window and that, as soon as he entered the room and looked out the front window, the police saw him and entered the house. With this context in mind, we turn now to Lee's contention that counsel provided ineffective assistance.

A. Ineffective Assistance of Counsel

¶7 Lee contends his trial counsel provided ineffective assistance in three primary ways: (1) counsel failed to present credible evidence to corroborate Tommie’s trial testimony that he and his wife were evicted from his sister-in-law’s residence on the same day as the police raid; (2) counsel failed to present evidence that the house was leased to an individual named Ramon Lavon Towns and to establish that Ramon Lavon Towns was the individual the brothers knew only as “Rowe”; and (3) counsel was ineffective in her cross-examination of Officer Burch regarding his testimony that he found a key ring in Lee’s possession that contained both keys to the house and Lee’s own personal keys. We address and reject each argument.

¶8 To succeed on a claim of ineffective assistance of counsel, Lee must demonstrate that counsel’s representation was deficient and that the deficiency prejudiced him. *See State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). Both deficient performance and prejudice present mixed questions of fact and law. *State v. Jeannie M.P.*, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We uphold the circuit court’s factual findings unless clearly erroneous. *State v. Thiel*, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. However, we review de novo whether counsel’s performance was deficient or prejudicial. *Jeannie M.P.*, 286 Wis. 2d 721, ¶6.

¶9 To prove deficient performance, Lee must show that, under all of the circumstances, counsel’s specific acts or omissions fell “outside the wide range of professionally competent assistance.” *Strickland v. Washington*, 466 U.S. 668, 690 (1984). We review counsel’s strategic decisions with great deference because a strong presumption exists that counsel was reasonable in his or her performance.

Id. at 689. Accordingly, we make “every effort ... to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Id.*

¶10 To prove prejudice, Lee must establish a reasonable probability that, “but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694.

¶11 Lee first contends that trial counsel was ineffective in failing to introduce corroborating evidence to prove that Tommie was evicted from his sister-in-law’s residence on the day in question. As indicated, Lee argues that evidence about the eviction was central to his defense theory because it was a critical part of Lee’s explanation for why he was in the house at the time of the police raid.

¶12 Trial counsel called three witnesses to establish that Tommie was evicted on the day in question: Lee and his two brothers, Jimmie and Tommie. Lee contends that this strategy was ineffective because Lee and his brothers all had poor credibility. Specifically, all three individuals had numerous prior criminal convictions, the numbers of which were disclosed to the jury, and, because they were brothers and therefore presumed to be biased toward each other, the jury was likely to discredit their testimony regarding the eviction. Lee argues that, given these facts, it was essential that defense counsel pursue a defense strategy that would have bolstered the Lee brothers’ credibility. Lee asserts this could have been accomplished by calling Tommie’s wife, Jacklyn, to testify about the eviction because she had direct contact with the Milwaukee County sheriff’s office concerning the timing of the eviction and she was at the

residence from which she and Tommie were being evicted while the eviction was in process. Lee argues that calling Jacklyn to testify would have bolstered the Lee brothers' credibility because Jacklyn had no prior criminal convictions and was not directly related to Lee. Lee also argues that counsel should have called as a witness an employee of the sheriff's office, Melissa Emond, who established at the *Machner* hearing that Tommie was evicted between 9:30 and 10:30 a.m. on the same day as the police raid. According to Lee, the evidence from Jacklyn and Emond would have provided objective and unimpeachable evidence of Tommie's eviction on the day in question and therefore bolstered the testimony from Lee and his brothers that the eviction actually occurred.

¶13 Lee also argues that defense counsel was ineffective for failing to object to a line of questioning by the prosecutor directed to Tommie raising the incorrect suggestion that, as a matter of law, the eviction could not have taken place on the day of the raid. At trial, the prosecutor asked Tommie whether he was aware the sheriff cannot evict a person until eviction proceedings are complete, and that the eviction proceedings against Tommie were not completed until one and a half months after the police raid. Tommie testified that he was not so aware. Lee argues that defense counsel should have objected to this line of questioning regarding the eviction process and that counsel should have informed the jury as to what Lee considers to be the correct law regarding the eviction process.

¶14 We assume, without deciding, that defense counsel was deficient in failing to introduce credible evidence corroborating Tommie's testimony that he had been evicted on the day of the police raid. We therefore turn to determine whether Lee has established that he was prejudiced by counsel's deficient performance. We conclude that Lee has not demonstrated prejudice.

¶15 Lee contends that he was prejudiced by counsel's deficient performance because, had defense counsel presented credible evidence to corroborate Tommie's eviction claim, there is a reasonable probability that the jury would have believed that Lee was at the house for the reason he stated, and that he was not using the house for drug dealing. Lee argues that testimony from Jacklyn and the employee from the Milwaukee County sheriff's office likely would have resulted in a different verdict because the State's evidence against him was weak. Lee contends that the State's evidence against him was weak because the State did not recover any evidence, other than finding Lee in the house, connecting Lee to the house, such as his DNA, his fingerprints, mail addressed to him at the house address, or other personal identifiers that would usually be found in a person's house. Because the State's evidence against him was weak, it follows, according to Lee, that there is a reasonable probability that the outcome would have been different had defense counsel presented evidence to corroborate Tommie's eviction claim, which, he submits, effectively placed him in the house for an innocent purpose.

¶16 A significant flaw with Lee's argument is that he fails to address Officer Harms' unchallenged testimony that he did not see any items in the basement supporting Lee's defense that he was at the house to move Tommie's belongings into the basement. Officer Harms, the lead investigator in the case, testified that when he walked through the house, he did not observe any of the items Lee and his brothers claimed were moved into the basement. Lee and his brothers testified that they moved the following items into the basement: glass tables, bed frames, box springs and moving boxes. Although Officer Harms testified that he did not conduct a thorough search of the basement, there is a strong inference that these items would be large enough that they would not have

escaped Officer Harms' attention based on even a quick view of the basement. Officer Harms' testimony that he did not observe any of these items in the basement during his search clearly undercuts Lee's explanation for why he was in the house at the time of the raid. Lee provided no evidence challenging this part of Officer Harms' testimony, nor does he explain on appeal why Officer Harms would not have readily seen these items during his search for drugs in the basement.⁴

¶17 Because the heart of Lee's defense theory was so thoroughly undermined by Officer Harms' testimony that he found nothing in the basement consistent with Tommie's eviction claim, given the balance of the evidence in this case, we conclude that there is not a reasonable probability that the additional evidence Lee points to would have altered the outcome of this case. As summarized above, there was undisputed evidence that Lee was found, alone, next to crack cocaine and other items commonly associated with crack cocaine dealing, and with Officer Harms' testimony, the "eviction defense" essentially collapsed. Accordingly, because Lee has not demonstrated prejudice, we conclude that defense counsel was not ineffective for failing to present corroborating evidence supporting Tommie's testimony that he had been evicted earlier on the day of the police raid.

¶18 We turn next to Lee's second and third claims of ineffective assistance of counsel. The question we must resolve is whether there is a

⁴ We observe that Lee did not allege in his postconviction motion that defense counsel was ineffective for failing to preserve evidence of the alleged move. To the extent that Lee does touch on this topic in his appellate briefs, he does not present a fully developed argument. Accordingly, we do not address that argument. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

reasonable probability that the outcome would have been different had counsel established that “Rowe” was one of the individuals leasing the house and had counsel cross-examined Officer Burch in more detail regarding his testimony about the keys found on Lee, which helped to establish the keeping a drug house charge.

¶19 Lee first argues that defense counsel was ineffective by failing to introduce evidence that the house was leased to Ramon Lavon Towns and then to establish that Ramon was the individual the brothers knew only as “Rowe.” We understand Lee to be arguing that evidence that the house was leased to “Rowe” would have been additional evidence distancing Lee from the house, and thereby would have weakened the State’s claim that Lee exercised management and control over the house, an element of the keeping a drug house charge.

¶20 We conclude that defense counsel was not deficient in failing to introduce the lease as evidence for the purpose of helping to establish that Lee was not exercising management and control over the house, and that instead “Rowe” was, because defense counsel testified at the *Machner* hearing that the brothers never informed her that a person named “Rowe” was selling drugs out of the house. While defense counsel acknowledged that she was given a copy of a lease agreement that provided that Ramon Lavon Towns was a co-tenant, defense counsel indicated that neither Lee nor any of his brothers told her anything about a person named “Rowe” to suggest that “Rowe” was Ramon Lavon Towns who was leasing the house. Counsel’s duty to investigate witnesses does not extend to witnesses not identified by the defendant as important to the defense when there is no other reasonably available source of information suggesting the need for investigation. We acknowledge that Wandell Lee, another one of Lee’s brothers, testified at the *Machner* hearing that he informed defense counsel shortly after

Lee's arrest that "Rowe" was Ramon Towns. However, we must accept the circuit court's determinations as to witness credibility and, even though the court did not make an explicit finding about Wandell's credibility, we assume the court made an implicit finding that Wandell was not credible based on the court's denial of Lee's postconviction motion. *See Jacobson v. American Tool Cos., Inc.*, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998) ("If a circuit court does not expressly make a finding about the credibility of a witness, we assume it made implicit findings on a witness' credibility when analyzing the evidence.").

¶21 Lee next argues counsel was ineffective in her cross-examination of Officer Burch. At trial, Officer Burch testified that he searched Lee and discovered a "master key ring" that contained keys that locked the front and back doors to the house, keys that locked the security gate in front of the house, and keys that belonged to Lee, unrelated to the house. The State relied on this testimony in arguing that Lee was keeping a drug house. Lee did not dispute that he was in possession of keys to the house but testified that they were not on the same "master key ring" as his own personal keys.

¶22 Lee contends that counsel should have cross-examined Officer Burch regarding the fact that: (1) Officer Burch did not prepare a police report in this case and was relying exclusively on his memory when he testified that there was a master key ring containing keys to the house, the security gate, and Lee's personal keys; (2) the police report omitted any mention of Lee's personal keys being found in Lee's possession; and (3) property inventory records did not list keys as among the personal items found in Lee's possession. Lee contends that, because of counsel's failure to cross-examine Officer Burch on these topics, the jury likely discredited Lee's testimony that keys to the house were not on the same key ring as Lee's personal keys and instead credited Officer Burch's testimony

that the keys were on the same key ring. It follows, according to Lee, that the outcome would have been different on the keeping a drug house charge had counsel more effectively cross-examined Officer Burch. We reject Lee's contentions.

¶23 Regardless whether Lee's personal keys were found on one master key ring holding the keys to the house and to the security gate, the critical point here is that there is no dispute that Lee was in possession of the house keys when he was discovered in the house. The only explanation that he provided at trial for possessing the keys—that he was in the house to use the bathroom after helping his brother Jimmie move Tommie's belongings into the basement—was heavily undermined by Officer Harms' testimony that he observed no items in the basement consistent with the eviction claim. Once Lee's reason for being in the house was discredited, it was far less important which keys were on which key ring. A strong inference to be drawn by the jury at that point, based on evidence that Lee was the only person found in a house that, according to Officer Harms, fit the criteria for a drug house, was that Lee was keeping a drug house. Accordingly, Lee was not prejudiced by defense counsel's failure to more aggressively cross-examine Officer Burch about whether Lee's personal keys were found on a master key ring holding the keys to the house.

¶24 For the above reasons, we conclude that Lee has failed to demonstrate that there is a reasonable probability that, absent defense counsel's alleged deficient performance, the outcome would have been different. Because Lee has not shown that counsel was ineffective, he is not entitled to a new trial.

B. *In Camera* Review

¶25 Lee next contends that the circuit court erred in denying his motion for the court to conduct an *in camera* review because Lee met his burden to prove that there was a possibility that the confidential informant could give testimony necessary to a fair determination of Lee's guilt or innocence. In support of his claim, Lee relies on an affidavit prepared by Officer Harms that the State used to obtain the search warrant. In that affidavit, Officer Harms averred that, within the previous seventy-two hours, a confidential informant reported that he observed an individual holding a "clear baggie" that contained an "off-white chunky substance" that the informant believed to be cocaine. The affidavit further provided that the confidential informant witnessed that individual sell cocaine from the house "numerous times within the past month." The informant described the individual as a 40- to 45-year-old black male who was between 5'10" and 6'0" and between 180 and 200 pounds. Lee argues, and the State does not dispute, that the physical description provided by the confidential informant does not match Lee's physical description. Lee takes the position that the confidential informant could provide testimony necessary to a determination of his guilt or innocence "by identifying someone [other than Lee] as dealing drugs from the residence."

¶26 The circuit court denied Lee's motion for an *in camera* review on the basis that it was irrelevant whether the confidential informant observed someone other than Lee sell cocaine from the house because Lee was found in the house at the time of the search, strongly suggesting that Lee was also selling drugs from the house.

¶27 WISCONSIN STAT. § 905.10 governs the circumstances under which the identity of a confidential informant may be disclosed. In general, the State has

a privilege to protect the identity of a confidential informant. *See* WIS. STAT. § 905.10(1). An exception to the privilege is provided in WIS. STAT. § 905.10(3)(b), which states, in relevant part:

If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case ... [and the] state ... invokes the privilege, the judge shall give the ... state ... an opportunity to show *in camera* facts relevant to determining whether the informer can, in fact, supply that testimony.

¶28 The Wisconsin Supreme Court in *State v. Outlaw*, 108 Wis. 2d 112, 321 N.W.2d 145 (1982), explained the standards to be applied in determining whether an *in camera* review is appropriate:

The procedure for an *in camera* hearing is triggered by:

“... evidence in the case or from other showing by a party that an informer *may* be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case.” (Emphasis supplied.) Sec. 905.10(3)(b).

This portion of the rule does not place a significant burden upon the party seeking disclosure. There need only be a “showing ... that an informer may be able to give testimony necessary” to a fair trial....

....

The showing need only be one of a possibility that the informer could supply testimony necessary to a fair determination....

Under the rule, once that showing is made, it behooves the state to either disclose the identity of the informer or avail itself of the opportunity to offer proof of what in actuality the informer can testify about.

Outlaw, 108 Wis. 2d at 125-26 (emphasis added).

¶29 Applying the statutory standard as explained in *Outlaw* to the facts of this case, we conclude that Lee has not met even his *minimal* burden of showing that there is a possibility that the confidential informant at issue here may be able to give testimony necessary to a fair determination of Lee's guilt or innocence. In this case, the factual dispute centered on why Lee was in the house at the time of the police raid and whether he exercised management and control over the house. Based on what is provided in Officer Harms' affidavit, the confidential informant might have been able to testify that he observed only one person sell cocaine from the house during the month prior to the house raid. Officer Harms' affidavit does not indicate that the informant observed an individual who fit Lee's description. We observe, however, that Officer Harms' affidavit does not suggest that the informant purported to be at the house on a constant basis during the pertinent time period. Instead, the affidavit only suggests that at a minimum one person was selling drugs out of the house. Lee does not explain how testimony that someone other than Lee was selling drugs from the house is probative of what he was doing at the time of the raid.

¶30 The analysis of whether an *in camera* review should be conducted focuses on the alleged offense and how the additional information from the informant might assist an actual, potential defense on the facts of the case. Here, Lee was found alone in a house for which he had keys and was standing next to a table containing crack cocaine and typical accoutrements associated with cocaine dealing. Thus, although the informant was in a position to identify, or at least provide additional details regarding, the person who he observed selling cocaine, Lee has failed to make the minimum showing that the informant might be able to give testimony bearing on whether Lee was also dealing cocaine out of the house.

¶31 Because Lee has not met his initial burden under *Outlaw* for the circuit court to conduct an *in camera* review, we conclude that the trial court properly denied Lee's motion to conduct such a review.

CONCLUSION

¶32 In sum, we conclude that: (1) Lee is not entitled to a new trial on the ground that defense counsel was ineffective because defense counsel's performance did not prejudice Lee; and (2) Lee is not entitled to an *in camera* review of the confidential informant's testimony because Lee has not shown that there is a possibility that the confidential informant may be able to give testimony necessary to a fair determination of Lee's guilt or innocence. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

